

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Preemption of State and Local)
Zoning and Land Use Restrictions)
On the Siting, Placement and)
Construction of Broadcast Station)
Transmission Facilities)

MM Docket No. 97-182

COMMENTS OF
PRINCE WILLIAM COUNTY,
VIRGINIA

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COMMENTS OF PRINCE WILLIAM COUNTY, VIRGINIA

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I. INTRODUCTION

The Federal Communications Commission (“Commission”), has undertaken this proceeding to consider whether, and under what circumstances, to preempt certain state and local zoning and land use ordinances. Specifically, the Commission has asked for comments on the preemption rule proposed by the National Association of Broadcasters and the Association for Maximum Service Television (“Petitioners”). The Commission asks whether there are circumstances in which it is appropriate for the Commission to preempt state and local regulations of the siting or construction of broadcast transmission facilities and whether federal regulations should preempt local regulations intended for aesthetic purposes. The Commission has also asked for comments on the time frames proposed by Petitioners and asks localities to comment on current siting procedures. Finally, the Commission has asked whether there is an appropriate role for the Commission in resolving disputes between localities and licensees with respect to tower siting issues.

The Board of County Supervisors, as the governing body of Prince William County, Virginia, submits these comments in response to the Commission’s request. Prince William County is a political subdivision of 355 square miles with a population of approximately 263,000.

II. SUMMARY

The proposed preemption rule would require the County to act (i) on a request to modify, strengthen or replace an existing transmission facility where no change or overall height is proposed within twenty-one (21) days; (ii) on any request concerning

relocation of an existing facility to another location within three hundred (300) feet, the consolidation of two or more broadcast facilities, or the increase of height of an existing tower within thirty (30) days; and (iii) on all other cases concerning the siting of a new tower within forty five (45) days. In addition, the proposed rule would preempt any local land use, building, or similar law unless the County can demonstrate that such regulation is reasonable in relation to clearly defined and expressly stated health or safety objectives, and also is reasonable in relation to federal interests in (i) allowing operators to construct facilities, and (ii) fair and effective competition amongst competing electronic media.

The County is opposed to any preemption of its traditional and State authorized zoning powers, especially when Congress has not expressed an intent that such local zoning powers be preempted.¹ Allowing all citizens to participate in a meaningful way on the land use issues directly affecting them is an important local procedure that should not be preempted by the Commission. Moreover, any local governing body should be able to consider traditional zoning issues, such as encroachment on historic areas and community harmony, in addition to health and safety issues when considering whether a proposed tower is appropriate in any particular area of the jurisdiction. This point is especially pertinent when any local act, including a denial, would not prohibit or have the effect of prohibiting the provision of the services contemplated in this proceeding.

The County is also opposed to the arbitrary time constraints imposed by the proposed preemption rule and is certain that any entity interested in seeking approval for

¹ Although the County has reviewed the Notice of Proposed Rule Making, it has serious reservations about the authority and jurisdiction of the Commission to issue a rule preempting local zoning ordinances adopted pursuant to State statute, when Congress has not expressly given such authority.

broadcast transmission facilities in the County would find that timely attention is given to their application. The County is concerned that providers of television services may be seeking to circumvent normal procedures rather than diligently contacting localities where they wish to place facilities and proceeding through the necessary zoning procedures in a responsible fashion.

III. BACKGROUND

Prince William County is located approximately twenty-two (22) miles outside of the District of Columbia, which has been identified as the sixth highest television market in the country. To the best of our knowledge, at this time only one television station has its transmission facilities located within the County, although another facility was located in the County before relocating to another northern Virginia jurisdiction.²

Prince William County also has a number of other transmission facilities within the County which are used by cellular phone companies, paging companies, pcs providers, cable television, telephone relay, public safety radio, broadcast and other wireless service providers. The towers or other structures upon which these facilities are placed, have had to be located in accordance with the County's Comprehensive Plan and Zoning Ordinance.

State law permits the County to adopt a local zoning ordinance for the general purpose of promoting the health, safety or general welfare of the public. Towards these ends, such ordinance is required to, among other issues, give reasonable consideration to:

² Channel 53, Station WNVN, has transmission facilities located on a tower at Independent Hill within Prince William County. Although Channel 66, Station WVVF, used to have transmission facilities within Prince William County, those facilities are now located in Fairfax County.

(i) creating a convenient, attractive and harmonious community, (ii) protecting against the destruction of, or encroachment upon, historic areas, (iii) preventing the obstruction of light and air, and (iv) the preservation of agricultural and forest lands.³

Pursuant to State enabling authority, Prince William County has adopted its own zoning ordinance embodied in Chapter 32 of the Prince William County Code. The County allows towers of certain heights by right in certain areas of the County. However, if a proposed tower exceeds a specified height, the applicant seeking to construct such tower must obtain a special use permit from the County. To obtain a special use permit, the applicant's petition must be considered at public hearings before the County's Planning Commission and the County's Board of County Supervisors. At any public hearing, citizens have an opportunity to speak about the appropriateness of any proposed facility.

All counties within Virginia are required to adopt a comprehensive plan to guide and accomplish a coordinated, adjusted and harmonious development of the land within their jurisdictions.⁴ The County has adopted its own comprehensive plan, including a telecommunications element which sets forth the County's guidelines for locating telecommunications facilities, including television broadcast facilities within the County.

The Telecommunications Element of the Comprehensive Plan seeks to balance the need for telecommunications facilities with concerns about the propriety of allowing facilities in various locations. In general, the Comprehensive Plan directs

³ Sections 15.1-486 and 15.1-489 VA Code Ann.

⁴ Section 15.1-446.1 VA Code Ann.

telecommunications providers to seek placement of their facilities on existing structures or in non-residential areas of the County. The plan recommends that telecommunications facilities be placed in residential areas only if no other location is suitable and only if the impact of such use can be effectively ameliorated. The plan also promotes collocation to minimize tower proliferation.

The County has applied its comprehensive plan and its zoning ordinance to various telecommunications facilities, including towers proposed by cellular carriers, pcs providers and even the towers proposed for the County's 800 MHz public safety system. In every case, the public has been given the opportunity provided by law to speak in public on these issues and the Board of County Supervisors has given due consideration to their comments and legitimate zoning concerns, as well as health and safety concerns.

IV. DISCUSSION

A. The Commission should not preempt the local exercise of zoning authority.

1. The Commission should not adopt the proposed rule.

The proposed rule would severely impinge upon the local zoning authority that the County currently has to consider important public issues such as the creation of a convenient attractive and harmonious community, protection of historic areas, preventing the obstruction of light and air, and the preservation of agricultural and forest lands. These issues are very important to Prince William County, and we suggest to many localities. The local community should have a chance to voice its concerns on these issues, and the governing body of the County should be able to consider these valid concerns in deciding whether to permit a broadcast operator to place a tower within, or

too near, a residential area when no clear safety or health reasons might otherwise allow the County to deny such application. The public interest is served by these considerations.

Of note, is the fact that the Board of County Supervisors has applied these standards to even its own 800 MHz public safety radio system. When County staff proposed to erect a 260 foot tower in the vicinity of a residential area within the County, many residents appeared at a public hearing to voice their concerns to the County Board. Ultimately, the Board concluded that it was inappropriate to place such a facility so close to a residential area when adequate public safety radio coverage could have been provided by using other sites.

Localities should be able to continue to consider traditional zoning issues when reviewing applications for the construction of broadcast transmission facilities, just as our County has considered such issues when evaluating the appropriateness of certain local public safety facilities. It is difficult, if not impossible, to assert that broadcast transmission facilities should be subject to more lenient standards than public safety facilities.

The County urges the Commission not to preempt local authority in this area, especially when Congress has not directed the Commission to preempt local regulation under these circumstances.

Even assuming that Congress intended to allow the Commission discretion when considering preemption of local zoning authority in this area, the County suggests that the

Commission review Section 704 of the 1996 Telecommunications Act.⁵ In Section 704, Congress refused to preempt local zoning discretion in connection with the construction of wireless facilities, but decreed that no locality should adopt any law or regulation that would prohibit, or have the effect of prohibiting, wireless services in the community. Just as Congress focused on whether local action would prohibit the provision of wireless service in the community, the Commission should focus on whether local action would prohibit the provision of digital television.

The County understands that the broadcast industry has technology which allows it some degree of flexibility in locating its facilities to provide coverage over certain areas. Because broadcasters have this degree of latitude, localities should be able to exercise their zoning authority to steer broadcasters away from areas where the locality determines that broadcasting facilities are inappropriate for reasons of community harmony, historic preservation, preservation of agricultural and forest lands and other legitimate local zoning concerns.

2. Any rule adopted by the Commission should define broadcast transmission facilities narrowly.

The County also objects to the broad definition of “broadcast transmission facilities”, which includes associated buildings. This broad definition raises the possibility that broadcasters might seek approval for inappropriate buildings in areas of the County where such uses are not permitted by County ordinance. If the Commission adopts the proposed rule in any form, the definition of broadcast transmission facilities

⁵ Codified at 47 U.S.C. 332(c)(7)(B)(i)(II).

should be narrowed to cover only those facilities absolutely necessary for transmission at a particular site.

3. Any rule adopted by the Commission should exclude radio broadcast transmission facilities.

The County objects to the preemption of its zoning authority over the location of radio broadcast facilities as well as television broadcast facilities. The broad preemption contemplated by the proposed rule would unnecessarily preempt zoning authority over radio facilities that simply are not affected by the Commission's rules on the roll out of digital television. To the extent that the Commission adopts any rules in this proceeding, such rules should not give any preemptive rights to radio facilities.

B. The Commission should not impose arbitrary time lines on the ability to consider applications for constructing broadcast transmission facilities.

The time lines set forth in the proposed rule would, at best, require the County to consider any proposals in a rapidly accelerated fashion that would not permit the normal time necessary for thoughtful staff and public review of relevant zoning issues and also might hamstring the ability of citizens to voice legitimate zoning concerns.⁶ At worst, the proposed time lines would override long standing procedural time lines and force the County to violate procedures that were established, pursuant to State law, to make sure that public concerns can be heard and considered before making a determination on special uses within the County.⁷

⁶ County residents are used to the normal public hearing procedures and, if the County is forced to accelerate its schedule, some citizens may unfortunately miss their opportunity to participate in the process.

⁷ Virginia localities may not adopt zoning ordinance amendments or special use permit applications, such as those which might be required to erect a broadcast

Although Virginia law contemplates the possibility of a joint hearing before a planning commission and governing body⁸, in practice, such an occurrence has been rare in Prince William County and would substantially diminish the Planning Commission's role. Normally, a zoning application or special use permit application is considered by the County Planning Commission and subsequently by the Board of County Supervisors. This allows for two public hearings. Generally, this process takes four to six months from the time of application by an interested party to final action by the Board of County Supervisors. It has been the County's experience that this process allows for the orderly and fair consideration of the relative merits of any application. The process allows the applicant to consider preferences in the community before making an application to construct a transmission tower which may dominate the landscape, and also allows citizens to voice their concerns on whether an application properly addresses the requirements of local zoning.

The County also must note that these time constraints concerning the roll out of digital television are imposed by the Commission, and possibly by delays by broadcasters

transmission facility, until after such ordinance amendment or permit application has been considered by both the local planning commission and governing body. Moreover, a planning commission may not make any recommendation, and a governing body may not adopt any ordinance, or approve any application, until notice of the intention to do so has been published once a week for two successive weeks. The hearing advertising any such notice may not take place less than six (6) days after the second advertisement appears in a newspaper. The term "two successive weeks" means that such notice shall be published at least twice in a newspaper without not less than six (6) days lapsing between the first and second publication. Section 15.1-431 VA Code Ann.

in taking appropriate steps to seek approvals in a timely fashion.⁹ If broadcasters make timely application for any new towers after paying close attention to local land use requirements many of the problems associated with this self imposed crisis should be alleviated.

The County believes that the Commission should not compel the County to telescope its state authorized and long standing deliberative process into an unreasonable scheme that, at best, would allow the County only forty-five (45) days to consider a proposed use that might have a serious impact on the community.

C. The Commission should not interject itself into local disputes concerning the siting of broadcast transmission facilities.

Historically zoning disputes have been resolved in the courts and this should continue to provide an equitable means of dispute resolution between localities and broadcasters on land use issues. It would be inappropriate for the Commission to interject itself into such proceedings, absent clear Congressional direction.

V. CONCLUSION

The County is opposed to any preemption of local authority over the siting of broadcast station transmission facilities.


⁹ Moreover, it seems ludicrous that a locality could be required to act within 45 days, with absolutely no leeway, while a broadcaster seeking this expedited consideration may have years to complete construction, and already has the ability to obtain extensions of time from the Commission for delays resulting from local siting problems.

RESPECTFULLY SUBMITTED,

BOARD OF COUNTY SUPERVISORS
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